United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7235

B

P/S

To be argued by
DAVID JAROSLAWICZ

In The

United States Court of Appeals

For The Second Circuit

FIMEX CORP.,
Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,
Defendant-Respondent.

On Appeal from the United States District Court for the Eastern District of New York.

ORIGINAL

BRIEF FOR PLAINTIFF-APPELLANT

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff-Appellant
2 Lafayette Street
New York, New York 10007
(212) 962-8020

UNITED STATES COURT OF APPEALS
FILED
JUL 13 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ALFRED S. JULIEN
STUART A. SCHLESINGER
DAVID JAROSLAWICZ
Of Counsel

10893

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

INDEX

Page

Statement of the Issues Presented for Review 1

Statement of Facts

Nature of the Case 3

ARGUMENT

POINT I

SECTION 2(a) OF THE ROBINSON-PATMAN ACT PROHIBITS A SELLER FROM CHARGING DISCRIMINATORY PRICES TO A PURCHASER LOCATED WITHIN THE UNITED STATES AND THE FACT THAT SOME OF THOSE GOODS MAY LATER BE EXPORTED BY THE PURCHASER DOES NOT PREVENT THE ROBINSON-PATMAN ACT FROM BEING APPLICABLE 7

POINT II

SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHERE QUESTIONS OF FACT EXIST AS TO WHETHER PLAINTIFF PURCHASED GOODS FROM THE DEFENDANT FOR RESALE IN THE UNITED STATES AND WHETHER THE DEFENDANT CHARGED THE PLAINTIFF A DIFFERENT PRICE FOR GOODS THAN IT CHARGED OTHER PERSONS IN COMPETITION WITH THE PLAINTIFF 18

CONCLUSION 23

TABLE OF AUTHORITIES

	Page
Baysoy v. Jessop Steel Co., 90 F.Supp. 303 (W.D. Pa. 1950)	15
Empire Electronics Co. v. United States, 311 F.2d 175, 179 (2d Cir. 1962)	22
F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 80 S.Ct. 1267 (1960)	14
F.T.C. v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 358 (1963)	8
Hospital Building Co. v. Trustees of Rex Hospital, 96 S.Ct. 1848, 1853 (1976)	22
Heyman v. Commerce & Industry Insurance, 524 F.2d 1317 (2d Cir. 1974)	21, 22
Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1974)	21
Mid-South Distributors v. F.T.C., 287 F.2d 512 (5th Cir. 1961)	12, 14
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)	22
Robinson v. Stanley Home Products, Inc., 178 F.Supp. 230 (D.C. Mass. 1959), aff'd 272 F.2d 601 (1st Cir. 1959)	15
United States v. Diebold, Inc., 369 U.S. 654 (1962)	19
United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)	13
Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 402 F.Supp. 244 (E.D. Pa.) pet. denied, 521 F.2d 1399 (3rd Cir. 1975)	10, 11, 12

Other Authorities: Page

Senate Judiciary Committee on the Robinson-Patman bill 9

80 Cong. Rec. 6333 (1936) 16

77-7235

In The

United States Court of Appeals

For the Second Circuit

FIMEX CORP.,

Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF

Statement of the Issues Presented for Review

1. Was the Court below correct in finding that the Robinson-Patman Act does not apply to sales made by a manufacturer to a distributor located in the United States and which goods are shipped to the distributor-purchaser's warehouse in the United States, some of which goods are later exported by the distributor-purchaser?

2. Was the Court below correct in granting the defendant's motion for summary judgment and finding that as a matter of law the plaintiff had purchased all of its goods from the defendant for export despite the plaintiff's contention that it had not purchased the goods for export but had been unable to sell any of the defendant's goods within the United States due to the discriminatory prices charged by the defendant and had been compelled to sell them abroad, or with regard to certain goods, had been unable to sell them at all and the goods remained in its warehouse?

STATEMENT OF FACTS

Nature of the Case

This is an appeal from an order of the Honorable Thomas C. Platt of the United States District Court for the Eastern District of New York, granting the defendant's motion for summary judgment and dismissing the plaintiff's complaint with costs.

The plaintiff in this action is a New York corporation with its principal place of business in Syosset, Long Island (6a).* The plaintiff is involved in the business of distributing automobile parts in the United States and abroad (7a, 141a). Since approximately 1960, the plaintiff has purchased automobile parts, particularly tie rods, from the defendant who is located in Ohio and is a manufacturer and distributor of automobile parts (7a, 141a).

For many years, the plaintiff had been purchasing automobile parts, particularly tie rods, from the defendants. The plaintiff was unable to successfully compete in the sale of tie rods in the United States and was only able to make some sales

---

* All page references are to the Joint Appendix unless otherwise indicated.

of the defendant's tie rods abroad (41a).

In the Spring of 1976, the plaintiff hired an employee who had previously worked for a competing auto parts company and the plaintiff, for the first time, was made aware that the reason it had been unable to compete in the sale of the defendant's products was that the defendant had been discriminating in price against the plaintiff. The plaintiff for the first time learned that the defendant had two different price lists, only one of which had been made available to the plaintiff. The plaintiff was provided with one price list, e.g. (43a-47a) and some of the plaintiff's competitors were provided with a different price list (48a-52a). The price lists which the plaintiff's competitors were provided with contained an additional column offering prices substantially below the prices offered and charged to the plaintiff. For example, item No. 290R which the plaintiff's price list carried at $192.00 was offered to the plaintiff's competitors at $157.00. (Compare the last line on page 43a with the last line on page 48a). In the highly competitive business of automobile parts, an average price discrimination of between 20% and 25% made it impossible for the plaintiff to compete.

The plaintiff commenced this action on November 4, 1976 (1a) against the defendant alleging a violation of the Robinson-Patman Act 15 U.S.C. 13(a) and seeking damages and injunctive relief (2a-5a). The defendant did not answer the complaint but

moved for summary judgment or in the alternative to dismiss pursuant to Rule 12(b)(6) on the grounds that the complaint failed to state a claim for relief (10a). The basis for the defendant's motion was that the plaintiff had allegedly purchased for export or exported all of the goods purchased from the defendant and the Robinson-Patman Act was thus claimed to be inapplicable, and on various technical grounds, that the complaint allegedly did not set forth a claim under the Robinson-Patman Act (19a-30a).

In order to avoid a dispute on technical grounds, the plaintiff filed and served an amended complaint on or about January 4, 1977 (6a-9a), which complaint disposed of all of the grounds for defendant's motion except the defendant's claim that the Robinson-Patman Act did not apply because the plaintiff had allegedly purchased for export or exported all of the goods it had purchased from the defendant. The defendant then asked the Court to direct its motion as against the plaintiff's amended complaint (31a-33a).

The plaintiff opposed the defendant's motion for summary judgment (39a-55a) taking the position that the Robinson-Patman Act was applicable to goods sold to a United States corporation located in the United States and shipped to a destination in the United States and the fact that the plaintiff had later exported some of the goods did not prevent the Robinson-Patman Act from being applicable since the plaintiff was being injured in its business, which was located in the United States, and was prevented

from competing with other businessmen in the United States who were receiving the benefit of the defendant's discriminatory prices. In addition, the plaintiff contended that it had attemped to sell the defendant's products within the United States but had been unable to do so due to the discriminatory prices charged to the plaintiff by the defendant (39a-41a).

The plaintiff also contended that all of the goods which it had purchased from the defendant had not been exported and that some of the goods purchased by the plaintiff from the defendant had been unable to be sold at all due to the discriminatory prices and were still sitting in the plaintiff's warehouse (39a, 57a).

The motion was argued before Judge Platt on February 16, 1977 and the Court issued its decision on April 14, 1977 granting the defendant's motion for summary judgment on the ground that the Robinson-Patman Act was not applicable and awarding the defendant costs as against the plaintiff. The decision of the Court below is recorded at 429 F.Supp. 978 (E.D.N.Y. 1977) (140a-143a). A judgment was entered in favor of the defendant and against the plaintiff (144a). It is that judgment which the plaintiff is now appealing to this Court.

ARGUMENT

POINT I

SECTION 2(a) OF THE ROBINSON-PATMAN ACT PROHIBITS A SELLER FROM CHARGING DISCRIMINATORY PRICES TO A PURCHASER LOCATED WITHIN THE UNITED STATES AND THE FACT THAT SOME OF THOSE GOODS MAY LATER BE EXPORTED BY THE PURCHASER DOES NOT PREVENT THE ROBINSON-PATMAN ACT FROM BEING APPLICABLE

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), in pertinent part provides:

> " It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States. . ."

The Court below found that the phrase in the Act "where such commodities are sold for use, consumption, or resale within the United States" requires that the goods being sold at a discriminatory price must actually be used, consumed or resold within the United States (141a), thus the Court below stated:

"Thus, if all the sales between the defendant and the plaintiff were for resale abroad, this statute is inapplicable." (141a)

In essence, the Court accepted and adopted the interpretation urged upon the Court by the defendant that the term "within the United States" modifies the clause "for use, consumption and resale" and requires that not only the sale of the goods be within the United States but that the goods be sold within the United States for resale within the United States. As will be shown, this interpretation of the Robinson-Patman Act is contrary to a plain reading of the statute, the cases, the legislative history and common sense.

The purpose of the Robinson-Patman Act is to obviate price discrimination practices and intended to ensure that businessmen at the same functional level would be in the same position competitively so far as prices were concerned. See, F.T.C. v. Sun Oil Co., 371 U.S. 505, 83 S.Ct. 358 (1963). No where in the Act is there any indication that businessmen in the United States who are engaged in exporting some of their goods are to be excluded from the Act.

We do not reach the issue of whether a manufacturer or supplier may charge all of its customers two different prices depending upon whether or not they export the goods involved.

What we are concerned with here and what the plaintiff's claim is, is that the defendant charged the plaintiff highly discriminatory prices between 20% and 25% more than the defendant was charging the plaintiff's competitors who were engaged in selling the defendant's products to persons both in the United States and exporting the defendant's products abroad. It is this discrimination amongst businessmen which are domestic corporations located within the United States and which goods the defendant would ship to the plaintiff's warehouse within the United States that the plaintiff is complaining about. The plaintiff was being injured in competing with other businessmen in the United States for sales both domestically and abroad. It is this injury to a United States domestic corporation which is being complained of and this is precisely the type of situation which the Robinson-Patman Act was intended to prevent and make illegal.

The Robinson-Patman Act is part of an amendment to the Clayton Act. Being an amendment to the Clayton Act, the definitions set forth in Section 1 of the Clayton Act become applicable. The Report of the Senate Judiciary Committee on the Robinson-Patman bill makes this explicit (S. Rep. No. 1502, 74th Cong. 2d Sess. 3 (Feb. 3, 1936)):

> "The special definition of Section 1 of the Clayton Act will apply without repetition to the terms concerned where they

> appear in this bill since it is designed to become by amendment a part of that act. Thus the term "commerce", as used herein, becomes by force of those definitions interstate and foreign commerce of the United States . . . ."

The plain reading of the Act as supported by the legislative history is thus made clear that so long as the sale of goods is made by a supplier to a purchaser within the United States and those goods are purchased for use, consumption or resale, then the Robinson-Patman Act is applicable. The fact that the first purchaser in the United States may later resell the goods in question to a foreign country and export them does not affect the rights of that United States purchaser to be afforded the protection of Section 2(a) of the Robinson-Patman Act.

The Court below in its decision finding that the Robinson-Patman Act is not applicable to the case at bar because the plaintiff exported certain of the goods it purchased from the defendant, relied heavily upon the case of Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 402 F.Supp. 244 (E.D. Pa.) pet. denied, 521 F.2d 1399 (3rd Cir. 1975) (141a). The Zenith case is totally inapplicable to the case at bar. In Zenith, the plaintiff brought an action against a Japanese company charging that the defendant was selling televisions in the United States at a lower and different price than it was

charging for the same televisions in Japan, thus injuring the plaintiff. The Court in Zenith found that the Robinson-Patman Act did not apply since one of the sales at a different price was taking place in Japan and not in the United States. The Court below cited the language in Zenith and stated:

> "The 'use, consumption, or resale' clause makes it equally clear that the commodities involved must eventually reach the United States. Hence, no cause of action arises under the Act unless both commodities involved in the alleged price discrimination are 'sold for use, consumption, or resale within the United States.' That, of course, is not the case here, for one 'leg' of the price discrimination alleged by plaintiffs involves commodities that are 'sold for use, consumption, or resale,' not within the United States, but within a foreign country, Japan. I conclude therefore that on its face the statute does not reach the transactions alleged here." (141a-142a)

A careful reading of the Court's statement in Zenith, however, makes it clear that the Robinson-Patman Act, although not applicable in the Zenith case, is applicable in our case since in our case both legs of the discriminatory transactions complained of occurred within the United States. Both the plaintiff and the plaintiff's competitors were located within the United States, the sales by the defendant to them were made in the United States and the goods were shipped by the defendant to locations within the United States. The Robinson-Patman Act is applicable and the instant case is distinguishable from

Zenith by a reading of the very language from Zenith relied upon by the Court below.

In a case dealing with Section 2(f) of the Robinson-Patman Act involving buyers, the Court in Mid-South Distributors v. F.T.C., 287 F.2d 512 (5th Cir. 1961), made it clear that the Robinson-Patman Act does not concern itself with the resale of goods but with the initial purchase or sale, the Court stating:

> "As to buyers, what the statute covers and forbids is the receipt of a discriminatory price differential in the purchase of goods from suppliers. It does not involve the resale of such goods by that buyer. ... resales after receipt of the goods in interstate commerce are of utterly no relevance."
> 287 F.2d at 516

Similarly, in construing Section 2(a) of the Robinson-Patman Act, it would be incongruous to read Section 2(a) as requiring the resale by the purchaser to be made within the United States. Subdivision (a) of the Act like subdivision (f) of the Act makes resales after receipt of the goods by the initial purchaser totally irrelevant. All that is required is that the initial purchaser be in the United States and purchase the goods for use, consumption and resale anywhere in the world.

If the defendant's interpretation of Section 2(a) were accepted so that the seller of goods was permitted to follow his goods and limit the uses to which his customer, in

this case the plaintiff, could put the goods after the seller had parted with title and interest to those goods, the seller would probably be running afoul of and violate Section 1 of the Sherman Act pursuant to the doctrine set forth in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), which prohibits a supplier from restricting or limiting what a purchaser may do with goods after the purchaser has obtained title to those goods.

The Court below, in reaching its decision that the Robinson-Patman Act was inapplicable, also relied heavily upon a statement in Congressman Patman's book, The Robinson-Patman Act (1938), where Congressman Patman stated:

> "Therefore, in applying the Act to export sales, it is evident that no limit or regulation of price discrimination in such sales is intended, unless goods involved in such transactions are resold for use, consumption, or resale in any place under the jurisdiction of the United States. It is likewise apparent that the parties to any sales transaction, regardless of where the parties are located, are not subject to the price-discrimination provisions of the Act, unless such goods are sold for resale in, or are to be used or consumed in, any place under the jurisdiction of the United States. (Emphasis added)" (141a)

Congressman Patman's statement relied upon by the Court below is not at all clear that it is intended to apply to a situation such as the one at bar. It is difficult to conceive that Congressman Patman, one of the originators of

the Robinson-Patman Act, intended to exclude from the protection of the Act all of those persons who were in business in the United States and whose business in part consisted of selling goods to persons outside of the United States. In any event, even if one assumes that the Court below correctly understood Congressman Patman's statement that the Robinson-Patman Act in his opinion does not apply to persons such as the plaintiff in our case, Congressman Patman's opinion is not binding upon this Court nor does it necessarily accurately represent the Robinson-Patman Act as enacted.

The Supreme Court in F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 80 S.Ct. 1267 (1960), in considering the weight to be given to statements made by Congressmen instrumental in enacting the Robinson-Patman Act with regard to the statutory construction of the Robinson-Patman Act, stated:

> "But the primary function of statutory construction is to effecuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of the weighty countervailing considerations which are present in this case."

See also, Mid-South Distributors v. F.T.C., 287 F.2d 512 at 516, footnote 7 to the same effect. Thus, if Congressman Patman did in fact intend to state that in his opinion Section 2(a) of the Act required that the first purchaser be required

to resell the goods only within the United States, then the plaintiff submits that Congressman Patman's statement is not in accord with what the law is and with the purposes of the Robinson-Patman Act.

The Robinson-Patman Act was enacted to prevent price discrimination amongst competing businessmen. Subdivision (a) of the Act prohibits price discrimination and the remaining subdivisions of the Act prohibit various practices such as brokerage fees and the furnishing of services so as to prevent any attempt to avoid the prohibitions of Subdivision (a). See, e.g., Robinson v. Stanley Home Products, Inc., 178 F.Supp. 230 (D.C. Mass. 1959), aff'd 272 F.2d 601 (1st Cir. 1959).

It is uncontroverted that Section 2(c) of the Act which prohibits the payment of brokerage fees or commissions applies to goods which are resold for export as well as to goods which are sold for resale in the United States. See, e.g., Baysoy v. Jessop Steel Co., 90 F.Supp. 303 (W.D. Pa. 1950). It would be incongr[illegible]s to construe the Robinson-Patman Act so that Subdivision (c), which was enacted in order to prevent a method of evading Subdivision (a) prohibiting price discrimination, should apply to goods which are resold outside of the United States while Section 2(a) which is the primary section prohibiting price discrimination would not apply to

any goods which are resold outside of the United States.

The legislative history of the Act similarly supports the plaintiff's position that the Robinson-Patman Act is applicable so long as the sale by the supplier is to a customer located in the United States and not to a customer outside the United States.

During the 1936 Congressional debates, the following colloquy took place:

> "MR. LOGAN. . . . The purpose of the bill is to compel the treatment of all customers exactly alike when the same situation applies to all of them.
>
> "MR. VANDENBERG. Would that apply equally to a customer in the United States and a customer out of the United States?
>
> "MR. LOGAN. I do not think it applies to a customer out of the United States.
>
> "MR. VANDENBERG. The Senator does not think the provision he is talking about would prevent sales of surplus products abroad at lower prices?
>
> "MR. LOGAN. I do not. As I recall, the provisions of the bill are confined specifically to the United States and possessions of the United States."
> 80 Cong.Rec. 6333 (1936).

This makes it obvious that when the Robinson-Patman Act restricts its application to the United States, it is making a distinction between sales made by suppliers to persons or

businessmen located in the United States and sales by suppliers made to persons abroad.

The plaintiff has been unable to find any case directly in point to the case at bar where there is a decision as to whether or not Section 2(a) of the Robinson-Patman Act is applicable to sales made by a supplier to a purchaser such as the plaintiff in our case where the purchaser is located in the United States and the goods are shipped to a location within the United States and the purchaser later resells some of those goods abroad. However, the legislative history, the case construing Subdivisions (c) and (f) of the Act, and common sense dictate that the Robinson-Patman Act is applicable to a case such as the one now before the Court, involving a plaintiff operating a business in the United States, competing with other businessmen in the United States for sales both in the United States and abroad and who is unable to compete for sales both in the United States and abroad because of the defendant's discriminatory pricing system.

The defendant's charging the plaintiff a different price than was charged by it to the plaintiff's competitors for the same goods which were sold during the same time period constituted a clear violation of Section 2(a) of the Robinson-Patman Act.

POINT II

SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHERE QUESTIONS OF FACT EXIST AS TO WHETHER PLAINTIFF PURCHASED GOODS FROM THE DEFENDANT FOR RESALE IN THE UNITED STATES AND WHETHER THE DEFENDANT CHARGED THE PLAINTIFF A DIFFERENT PRICE FOR GOODS THAN IT CHARGED OTHER PERSONS IN COMPETITION WITH THE PLAINTIFF

As has already been shown in the previous POINT, the Court below erred in finding that Section 2(a) is inapplicable to goods sold by the defendant to the plaintiff because plaintiff exported some of those goods. However, even if we were to assume that the Court below was correct in finding that Section 2(a) does not apply to goods sold by the defendant to the plaintiff, if those goods were intended to be exported by the plaintiff, the court below should still not have granted summary judgment since there were numerous questions of fact involving the credibility of witnesses which only a jury could determine and which should not have been decided by the Court on a motion for summary judgment. These questions include:

> (a) were all of the goods purchased by the plaintiff from the defendant purchased for export or did the plaintiff intend to sell those goods in the United States? and
>
> (b) did the defendant charge the plaintiff a discriminatory price?

In opposition to the motion for summary judgment, the plaintiff submitted affidavits stating that the plaintiff had purchased goods from the defendant for sale in the domestic market

but had been unable to make any sales in that market due to the discriminatory price charged to it by the defendant (39a - 40a). Plaintiff went on to claim that due to the discriminatory price charged it by the defendant, it had been unable to sell some of the goods it had purchased from the defendant either domestically or abroad and was still stuck with those goods in its warehouse (39a, 56a-51a).

The Court below in granting defendant's motion for summary judgment found that the plaintiff had consistently exported all of the goods purchased from the defendant and that both sides had obviously intended that the goods purchased by the plaintiff from the defendant were to be exported (143a). The Court below in making this argument was pulling itself up by its own bootstraps.

The plaintiff admitted it had been unable to make any sales domestically and all of its sales had been in the foreign market but claimed that this was due to the discriminatory price charge to the plaintiff by the defendant.

On a motion for summary judgment, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought (United States v. Diebold, Inc., 369 U.S. 654 [1962]).

In our case, the Court below did exactly the opposite, drawing an inference in favor of the party moving for summary judgment rather than in favor of the party opposing it as it was required to do.

The Court below also went on to make a finding that except for the goods which the plaintiff sold in the export market the plaintiff only had 500 tie rods purchased from the defendant still in its possession (143a). The Court then continued on to find that since these 500 tie rods had been purchased pursuant to a purchase order which had been marked "FIMEX OTO ISTANBUL" that the defendant had been correct in assuming that the plaintiff had purchased those goods for export, once again drawing an inference in favor of the party moving for summary judgment rather than in favor of the party opposing it, despite the fact that the plaintiff had testified during its deposition that the markings "FIMEX OTO ISTANBUL" were simply a mark of convenience for the plaintiff's internal warehousing needs and not indicative of where the merchandise was to be sent (113a-115a).

In addition, the Court in reaching that determination completely ignored the supplementary affidavit of Isaac L. Cohen, dated February 24, 1977, wherein Mr. Cohen made it clear that in addition to the 500 tie rods referred to by the Court the plaintiff had in its warehouse additional items which were enumerated in the affidavit (57a) which had been purchased from the defendant pursuant to a purchase order,which order and markings made no reference at all to any foreign destination whatsoever (57a-58a). The plaintiff also submitted twenty-eight (28) separate orders which it had placed with the defendant between April, 1971 and November,

1976 which had no indication or markings possibly leading anyone to believe that the goods were destined for export (60a, 64a-65a).

This Court has made it clear that on a motion for summary judgment, the Court should not try issues of fact but only determine whether there are issues to be tried (Heyman v. Commerce & Industry Insurance, 524 F.2d 1317 (2d Cir. 1974)). In Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1974), this Court went on to state that summary judgment "must be used selectively if we are to avoid trial by affidavit."

The Court below not only exposed the plaintiff to a trial by affidavit but refused the plaintiff an opportunity to submit any additional affidavits with regard to its attempts to resell the defendant's product in the United States.

The Court, in its decision (143a), claims that it provided the plaintiff with an opportunity to continue the plaintiff's deposition to bring out any such additional facts but the Court's opinion does not state that it refused plaintiff's request to submit additional affidavits if they were necessary and denied the plaintiff's right to continue the deposition except at the offices of the defendant's attorneys in Washington, D.C. Since this is not set forth in the record, in light of the Court's statements in its decision about the opportunity afforded the plaintiff to continue the deposition, the conditions imposed become relevant.

There can be no question that there were issues of fact which were to be tried by a jury and once the Court had determined

that those issues of fact existed, it was required to deny the summary judgment motion and leave the issues for determination at trial (see Empire Electronics Co. v. United States, 311 F2d 175, 179 [2d cir. 1962]. Those questions of fact included whether or not the plaintiff intended to resell the defendant's goods in the United States and was prevented from doing so by the defendant's discriminatory pricing scheme and whether or not the defendant was charging the plaintiff a discriminatory price.

The Supreme Court has made it clear that particularly in antitrust cases summary judgment should be granted sparingly (see Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 [1962] and recently reiterated that position in Hospital Building Co. v. Trustees of Rex Hospital, 96 S.Ct. 1848, 1853 [1976].

A review of the materials submitted to the court on the summary judgment motion clearly indicates that there were questions of fact and that the moving party had failed to meet its burden of demonstrating the absence of any factual issues. As this Court stated in Heyman, supra,:

> ". . . when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute, Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970). This rule is clearly appropriate, given the nature of summary judgment.

> This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. Donnelly v. Guion, 467 F.2d 290, 291 (2d Cir. 1972)."

The plaintiff in this action had demanded a jury trial (2a) and if any factual issues existed they were to be resolved by the jury and not by the court on a motion for summary judgment.

The court below in reaching its decision ignored all of the evidence favorable to the plaintiff and improperly drew all inferences in favor of the defendant who was moving for summary judgment, deciding all of the factual questions, rightfully belonging to a jury,in favor of the defendant.

CONCLUSION

The Robinson-Patman Act is applicable to a sale of goods made by a supplier to a purchaser even if the purchaser later resells those goods outside the United States so long as the initial purchaser is within the United States and is competing with other persons in the United States.

Thus, the court below erred in finding that the Robinson-Patman Act was inapplicable in the case at Bar. The court also erred in granting summary judgment to the defendant in that there were factual issues as to where the plaintiff intended to resell the defendant's products which should only properly be determined

by a jury and should not have been decided by a court on a summary judgment motion.

For all of the foregoing reasons, the judgment of the court below granting summary judgment to the defendant should be reversed and the action remanded for trial before a different judge.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

Of Counsel:
Alfred S. Julien
Stuart A. Schlesinger
David Jaroslawicz

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

FIMEX CORP.,
Plaintiff-Appellant

- against -

Bar MATIC PRODUCTS, CO.,
Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 13th *day of* July *19* 77 *at* 475 Park Avenue New York, N.Y. *upon*

deponent served the annexed

Brief

Barnes Richardson & Colburn

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 13th
day of July *19* 77

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

Kevin E. Thomas
Print name beneath signature
KEVIN E. THOMAS